

October 27, 2003

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REVISED REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services file no. **E0001357**

JAMES AND DEBORAH MALONE
Code Enforcement Appeal

Location: 29105 – 148th Avenue Southeast

Appellant: James and Deborah Malone, *represented by*
John T. Ludlow, Attorney at Law
Hanson Baker Ludlow Drumheller P.S.
300 Surrey Building
10777 Main Street
Bellevue, WA 98004-5963
Telephone: (425) 454-3374
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King County: Department of Development and Environmental Services
Building Services Division, Code Enforcement Section,
represented by **Darren Wilson**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-7093
Facsimile: (206) 296-7055

SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:

Deny appeal

Department's Final Recommendation:

Deny appeal

Examiner's Decision:

Appeal granted in part,
denied in part

EXAMINER PROCEEDINGS:

Hearing Opened:

October 14, 2003

Hearing Closed:

October 14, 2003

This revised report and decision supersedes the decision issued October 24, 2003.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. A supplemental notice and order was issued by the King County Department of Development and Environmental Services, Code Enforcement Section, to James and Deborah Malone concerning alleged code violations on an approximately 25 acre parcel located at 29105 – 148th Avenue Southeast in the RA-5-PSO zone. The notice and order cites for the property for conversion of a residence into an office without the required change of use permits and operation of a nursery and landscape business without a conditional use permit. The supplemental notice and order supersedes an earlier notice and order issued in June 2003 that was based on alleged violations of home occupancy and home industry requirements. It is uncontested that the Malones do not reside on the cited property and that the existing residential structure has been converted into a business office. The Malones have agreed to obtain the necessary change of use permits once the underlying zoning use issue has been resolved.
2. Most of the basic facts underlying this appeal are not in dispute. After consulting with DDES concerning the regulations surrounding their proposed use, the Malones purchased the property in August 1999 and commenced business before the end of the year. The property is located on the east side of State Route 18 and was previously used as a construction storage yard. The nursery operation is located at the south end of the site on approximately 5 acres while another 5 acres near the north end of the property contains the office structure, vehicle parking areas, two pole buildings and some outside storage. The remainder of the site is undeveloped, and the two working areas are connected by a winding gravel road that exits the site both to the south and to the north.
3. Depending upon the season, some 30-40 employees work out of the site, 5 in the office, 6 as project supervisors, 4 full-time in the nursery and the remainder moving plant materials onto the property and installing them off site. The Malones' operation uses about 20 vehicles, 15 of them pick-up trucks. Landscape workers arrive at the site in the morning, park their vehicles and are dispatched to off-site job locations in company trucks. James Malone testified that they do some design work that is not based on the use of their nursery stock, but that implementation of such work is contracted out. While there is a small amount of walk-in business, there is no retail nursery facility, no significant access road frontage and no retail signage.

CONCLUSIONS:

1. Staff's determination that the Malones' business is not a permitted use in the RA zone is based on its reading of KCC 21A.08.060 and a conviction that the landscaping portion of the business is the dominant use. Under the heading of "Business Services", KCC 21A.08.060 contains an entry for "construction and trade" as a permitted use in the Rural Area subject to a condition which reads, "limited to landscape and horticultural services (SIC 078) that are accessory to a

use classified as retail nurseries, lawn and garden supply store (SIC 5261) and provided that construction equipment for the accessory use shall not be stored on the premises.” The Appellants rely, on the other hand, on the provisions of KCC 21A.08.090 relating to resource land uses and specifically the provisions thereunder that permit in the Rural zone “growing and harvesting crops” and “resource accessory uses.”

2. The resource land use entry for “growing and harvesting crops” is accompanied by a Standard Industrial Classification (SIC) number. KCC 21A.02.070 provides that the zoning use definitions contained in chapter 21A.08 are to be interpreted consistent with the SIC categories appended thereto. SIC 01 relates to agricultural production and describes establishments, including nurseries, “primarily engaged in the production of crops, plants, vines, and trees (except forestry operations)”. Sub-category 018, entitled “horticultural specialties”, includes “ornamental floraculture and nursery products.” It is clear, therefore, that a wholesale nursery is a permitted use under KCC 21A.08.090.
3. Based on Examiner Titus’s decision in the Wells code enforcement appeal (file no. E9701343), the Malones argue that the definition of horticulture ought to be read as including landscaping. Or in the alternative, that the landscaping business should be regarded as a permitted accessory use. KCC 21A.06.025 defines a “resource accessory use” as a “use, structure, or part of a structure, which is customarily subordinate and incidental to a resource use including, but not limited to” agricultural worker housing and product and equipment storage.
4. While both interpretations offered by the Appellants may be defensible, we prefer the viewpoint that the landscaping business is an accessory use to the growing and harvesting of crops within the Appellants’ nursery operation. This interpretation is more consistent with of the SIC 01 category, which is concerned exclusively the growing of crops and other vegetation. Regarding the landscaping business as an accessory use also provides a reasonable limitation on its expansion. That is, the level and type of landscaping permitted is that which deals primarily with the installation of plants grown on the property. While the Malones provide some planning services, their uncontested testimony is that their landscaping crew deals mainly with the installation of their own on-site nursery stock. Even though the installation portion of the business may be more labor-intensive than the growing of nursery stock, a nexus between the landscaping operation and nursery production insures that a reasonable balance between the two will be maintained consistent with the requirement for a subordinate relationship.
5. Staff’s reliance on KCC 21A.08.060 is understandable, but misguided. Although awkwardly written, note 34 should be read as a limitation on retail nurseries, not as an attempt to regulate wholesale nurseries. The language in the note is potentially confusing, but if it were read the way staff proposes, in the RA zone landscaping services appended to a high traffic retail nursery would be permitted outright while those attendant to a low traffic wholesale nursery would be prohibited. Common sense indicates that this is not the intended regulatory outcome. We conclude therefore that a wholesale nursery and its attendant landscaping operations focused primarily on the installation of nursery stock grown on the property should be regarded as the permitted growing and harvesting of crops with landscaping as a resource accessory use.

DECISION:

The appeal is **GRANTED** as to the legality of the Appellants' business use and **DENIED** as to the conversion of a residence into an office.

ORDER:

1. No penalties shall be assessed against the Appellants or their property if within 21 days of the date of this order required permit applications are submitted to DDES for changing the use of the residential structure to an office.

ORDERED this 27th day of October, 2003.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED via certified mail this 27th day of October, 2003, to the following:

James and Deborah Malone
29104 – 148th Ave. SE
Kent, WA 98042

John T. Ludlow, Attorney at Law
300 Surrey Bldg.
10777 Main St.
Bellevue, WA 98004-5963

TRANSMITTED this 27th day of October, 2003, to the following parties and interested persons of record:

John T. Ludlow
300 Surrey Bldg.
10777 Main St.
Bellevue WA 98004-5963

James & Deborah Malone
24322 228th Ave. SE
Maple Valley WA 98038-6030

Elizabeth Deraitus
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Patricia Malone
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Heather Staines
DDES/BSO
Code Enf.-Finance
MS OAK-DE-0100

Darren Wilson
DDES/LUSD
Code Enf. Section
MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE OCTOBER 14, 2003 PUBLIC HEARING ON DEPARTMENT OF
DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0001357.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing was Darren Wilson, representing the Department; Attorney John T. Ludlow, representing the Appellant; and Appellant James Malone.

The following exhibits were offered and entered into the record:

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|----------------|--|
| Exhibit No. 1 | DDES staff report to the Hearing Examiner, dated September 25, 2003 |
| Exhibit No. 2 | Copy of Notice and Order dated June 12, 2003 |
| Exhibit No. 3 | Copy of Notice of Appeal dated June 27, 2003 |
| Exhibit No. 4 | Copy of Supplemental Notice and Order dated September 5, 2003 |
| Exhibit No. 5 | Copy of Supplemental Appeal dated September 15, 2003 |
| Exhibit No. 6 | Copies of codes cited in the Supplemental Notice and Order |
| Exhibit No. 7 | Photographs (5 pgs) taken by Darren Wilson and Lamar Reed (undated) |
| Exhibit No. 8 | Copies of advertising – internet and telephone directory |
| Exhibit No. 9 | Packet of information containing Appellants' List of Witnesses and Exhibits, and items 4.1 through 4.8 |
| Exhibit No. 10 | Former Chapter 21A.08 |
| Exhibit No. 11 | Covington Water District, Customer Newsletter, dated August-September 2003 |

SLS:gao
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